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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 53

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

GEORGE D. KER and DIANE K. KER,
Defendants and Appellants.

PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

	PAGE
Opinions of the courts below	2
Statement of the grounds on which the jurisdiction of this court is invoked	2
Questions presented for review	3
Constitutional provisions which the case involves	4
Statement of the case	4
State of the proceedings at which and manner in which the federal question sought to be reviewed was raised	6
Arguments relied for the allowance of the writ	8
Appendix I. Opinion of the District Court of Appeal	App. p. 1

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145	9
Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081	7, 8, 9
People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905, 50 A. L. R. 2d 513	9
People v. Privett, 55 Cal. 2d 698, 12 Cal. Rep. 874	9

STATUTES

California Health and Safety Code, Sec. 11530	4
California Penal Code, Sec. 995	4, 6
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, Fourth Amendment	2, 3, 4, 10
United States Constitution, Fourteenth Amendment	2, 3, 4, 10

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GEORGE D. KER and DIANE K. KER,

Defendants and Appellants.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The Petition of George D. Ker and Diane K. Ker for a writ of certiorari to review a judgment of the District Court of Appeal, Second Appellate District, State of California, made and entered by said court on the 29th day of August, 1961, a copy of which is hereto appended, respectfully shows to this honorable court:

Opinions of the Courts Below.

No opinion was rendered by the trial court.

The opinion of the District Court of Appeal, Second Appellate District, State of California, has been reported officially at 195 A. C. A. 290 and unofficially at 15 Cal. Rep. 767. A copy of the opinion rendered by said court is annexed to this petition as Appendix I.

No opinion was rendered by the Supreme Court of California. Hearing by said court was denied. A copy of the Order Denying Hearing after Judgment by District Court of Appeal is annexed to this petition as Appendix II.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

The date of the judgment sought to be reviewed and the date of its entry are the 29th day of August, 1961. On petition for hearing in the Supreme Court of the State of California an order denying hearing was filed the 22 day of November 1961.

There was no order respecting a rehearing. An order staying issuance of remittitur until *January 23,* 1961, was issued. Other than that there has been no order granting an extension of time within which to petition for certiorari.

The case is one involving the introduction in a State Court of evidence secured in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

The statutory provision believed to confer jurisdiction upon the court to review the judgment of the court below is United States Code, Title 28, Section 1257(3).

Questions Presented for Review.

I.

Where police officers, acting without a search warrant and without a warrant to arrest, and acting without reasonable or probable cause to search and arrest, enter an apartment of the accused by means of a key secured from the manager while the accused is present in the apartment, and without warning and without permission of accused, and there seize contraband, have the rights of the accused which are guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States been violated?

II.

May contraband secured by police officers in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States be introduced into evidence in a prosecution for the possession of that contraband in a State Court?

III.

Where police officers have received information over a period of six months that an accused is selling narcotics from his home, and where police officers observe a meeting between the accused and a known supplier of narcotics but do not see anything pass between the accused and the supplier, and where the officers have no information of the presence of narcotics in the home of the accused, do the officers have reasonable and probable cause to enter the home of the accused without permission, conduct a search and make an arrest for the possession of contraband discovered by such search?

Constitutional Provisions Which the Case Involves.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person or life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

Statement of the Case.

The Petitioners were charged in an information filed by the District Attorney of the County of Los Angeles, State of California, with the violation of Section 11530 of the Health & Safety Code of the State of California, to wit: possession of marijuana. After pleas of not guilty and at the commencement of trial the Petitioners moved under Section 995 of the Penal Code of the State of California, to set aside the information upon the ground that they had been com-

mitted without reasonable or probable cause. Evidence was taken on this point, out of the presence of the jury, and the motion was denied. Thereafter the trial was had and the Petitioners were found guilty; the husband, George D. Ker, was sentenced to the State prison and the wife, Diane K. Ker, was given probation, conditioned upon serving a period in the County Jail.

The record shows as follows:

(1) Police officers (Deputy Sheriffs of the County of Los Angeles) had received evidence from November, 1959, to May, 1960, from unidentified persons that George Ker was selling marijuana from his home and that he had probably purchased it from one Murphy.

(2) The officers received information on four or five occasions during the period of May, 1960, to the date of arrest in July, 1960, from one Black of George Ker's activities in marijuana. (This was categorically denied by Black when he took the stand for the defense.)

(3) The officers observed a meeting between Ker and Murphy at a point in the early evening where they had observed a fellow officer make a purchase from Murphy the night before. They did not know Ker but secured his address from his license plate. The spot was well lighted, sufficiently so that they could identify Ker in court. They did not observe anything pass between Murphy and Ker.

(4) A short time later that same evening the officers went to the address of Petitioners as revealed by a check with the Department of Motor Vehicles, ascertained that someone was home, secured a key from

the manager of the apartment, opened the door of Petitioners apartment quietly and without knocking and without permission.

(5) On entering the apartment George Ker was in the front room sitting down. The officers identified themselves and announced they were conducting a narcotics investigation. They similarly identified themselves to the Petitioner Diane Ker. The officers then looked in the kitchen and observed a "kilo brick" of marijuana on some scales. The officers then placed the Petitioners under arrest, conducted an additional search and found some loose marijuana.

(6) The following day Officers went back to the apartment and searched a car belonging to Diane Ker and found additional marijuana.

(7) The officers had neither a search warrant nor a warrant of arrest for Petitioners.

State of the Proceedings at Which and Manner in Which the Federal Question Sought to Be Reviewed Was Raised.

Objections were made in the trial court on the motion under 955 of the Penal Code, and at the trial, to the introduction of the evidence seized on the ground that the search and seizure and the arrest of Petitioners were illegal. During the pendency of the appeal in the District Court of Appeal and after the Petitioners had filed their opening brief, this Honorable Court rendered its decision in the case of *Mapp v. Ohio*, 367

U. S. 643 (81 S. Ct. 1684, 6 L. Ed. 2d 1081) on June 19, 1961. The Petitioners urged this matter as decisive of the appeal in their closing brief. The Attorney General sought leave to file a supplemental brief to dispose of that decision and Petitioners filed an answer to the supplemental brief again raising the Federal question. Upon decision of the District Court of Appeal a petition for hearing in the Supreme Court of the State of California was filed by Petitioners again raising the Federal question and supporting their petition with decisions of this Honorable Court and the Courts of Appeal. This petition was denied. These briefs are filed herein as part of the record.

The District Court of Appeal disposed of this question (Appendix I) in the following manner:

> "In the light of the implied findings of the trial court in its conclusion that probable cause existed, and the more than ample facts supporting the same; and the circumstances surrounding the entry, the finding of the marijuana and the subsequent search of defendants' apartment, the recent reference to *Mapp v. Ohio*, ... U. S. ..... ; 81 S. Ct. 111, 6 L. Ed. 2d 1081, does not justify a change in our original conclusion."

Arguments Relied for the Allowance of the Writ.

While this case is important to the Petitioners, in that George D. Ker will have to serve a term in the State Prison and Diane K. Ker will have to serve a term in the County Jail as well as serve a probationary term if the writ is not granted, yet there are matters involved which are more important. First: the protection of the rights of other citizens is involved, and, second, the obedience of the States to the mandates of this Honorable Court is involved.

In *Mapp v. Ohio, supra*, the facts were, if anything, more favorable to the officers there involved, than in the case at bar. In the former case the officers had information that a person wanted for questioning was hiding in a house and that various paraphernalia was located there. They went to the house, identified themselves and refused permission to enter. Some three hours later, supported by additional officers, and armed apparently with a simulated search warrant, they broke into the house and discovered the evidence which was introduced into evidence in a State trial over objection. In the case at bar the officers had no information that contraband was located in the Petitioners' apartment [Rep. Tr. p. 270; p. 280, line 26, to p. 281, line 18]; they saw nothing pass between Murphy and Ker [Rep. Tr. p. 23, lines 4-6]; they went to Petitioners' apartment, ascertained that someone was home, secured a key from the manager, and quietly opened the door of Petitioners' apartment; then the officers identified themselves and announced that "we were conducting a narcotics investigation" [Rep. Tr. p. 28, line 19, to p. 30, line 9]; the officers then looked in the kitchen and found the marijuana and then placed the Petitioners under arrest.

The decisions of this Honorable Court are reviewed in the decision of *Mapp v. Ohio, supra*, and are presented by the Honorable Justice Clark far better than might be done in this Petition. To be brief, that decision pointed out that the States had been given a chance to order their affairs to as to give effect to the decisions of this Court and held at page 1691 (81 S. Ct.) that:

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."

The decision of this Court in *Agnello v. United States*, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, held:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause."

While the latter decision related to Federal officers, the reasoning there is now applicable to State officers through the *Mapp* decision. In the latter the Court pointed out that California had taken a step in the right direction in its decision in *People v. Cahan* (1955), 44 Cal. 2d 434, 282 P. 2d 905, 50 A. L. R. 2d 513, to protect the rights of accused persons.

Now the time has come to enforce the edict of the *Mapp* case and to require that the States give that decision more than lip service. In the words of the California Supreme Court in *People v. Privett*, (1960), 55 Cal. 2d 698, 12 Cal. Rep. 874:

> "'A man's home is his castle' is and should be more than an empty phrase."

Your Petitioners submit that their rights under the Fourth and Fourteenth Amendments to the Constitution of the United States and the evidence secured thereby should not have been admitted into evidence.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of California, to the end that the judgment of the District Court of Appeal, Second Appellate District of the State of California, may be reviewed and reversed by this Honorable Court.

MATTHEWS & STANLEY,

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ROBERT W. STANLEY,

Attorneys for Appellants and Petitioners.

APPENDIX I.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

The People of the State of California, Plaintiff and Respondent, vs. George D. Ker and Diane K. Ker, Defendants and Appellants. Criminal No. 7541.

Filed Aug. 29, 1961.

Appeal from judgment of the Superior Court of Los Angeles County, and order denying motion for new trial. Benjamin Landis, Judge.

Matthews and Stanley for Appellants.

Stanley Mosk, Attorney General, and George W. Kell, Deputy Attorney General, for Respondent.

Defendants were charged with possession of marijuana in violation of Section 11530, Health & Safety Code. A motion for dismissal under Section 995, Penal Code, was denied; the following was offered on the issue of probable cause. Sergeant Cook, negotiating for the purchase of marijuana arranged to meet one Terrhagen around 7 p.m. on July 26, 1960. Terrhagen picked up Cook in his car and drove to a bowling alley which he entered; he returned in a few minutes and told Cook they were to meet the "connection" by the oil fields near Slauson and Fairfax Avenues; Terrhagen then pointed out a parked 1946 DeSoto as the "connection's" car. They drove to Slauson and Fairfax where Cook again saw the 1946 DeSoto; Terr-

hagen told Cook the "connection" had his supply of narcotics somewhere in the hills. They parked in the vicinity near some vacant fields; the DeSoto proceeding ahead of them made a U-turn and pulled alongside. Cook identified the driver as Roland Murphy, whom he knew from "mug" photographs and police information to be a large-scale seller of marijuana then out on bail on two narcotic offenses. Terrhagen entered the DeSoto leaving Cook in the car; they proceeded north on Fairfax over the hill and into the oil fields out of Cook's sight and returned fifteen minutes later. Murphy pulled up alongside the car in which Cook was waiting; Terrhagen entered carrying a kilo brick of marijuana. Murphy drove off northbound on Fairfax; Terrhagen drove home where he carved off of the kilo of marijuana a pound which Cook bought. Cook then relayed the foregoing information to Sergeant Warthen and Deputy Berman.

During all this time, Sergeant Warthen had Murphy under surveillance and observed the transaction with Cook; he also thereafter received from Cook direct information concerning it. The next day, July 27, 1960, Sergeant Warthen and Deputy Markman again took up surveillance of Murphy, starting at Murphy's home, following him in his 1946 DeSoto to the same bowling alley. He remained there ten minutes, returned to the DeSoto and drove off; Segeant Warthen tried to follow but lost him; Warthen then drove to the Slauson-Fairfax location where he had staked out the evening before and observed Cook, Murphy and Terrhagen. Seated in his car with the lights off, parked near some vacant fields a short distance away, they saw defendant Ker, whom they did not then know. They were

not then interested in Ker; their prime interest was Murphy whom they suspected to be a large-scale marijuana seller and of whom they were conducting a narcotics investigation. Soon Murphy drove past in his DeSoto north on Fairfax; they tried to follow but lost him when he turned off his lights upon entering the oil fields. Shortly thereafter, Murphy returned, stopped behind Ker's automobile, got out, walked over to his car and appeared to talk to Ker. It was then between 8 and 9 p.m. Sergeant Warthen was about 1000 feet away and observed them through glasses; soon Ker drove away. Sergeant Warthen followed but lost him when he made a U-turn in the middle of the block; however he obtained the license number of the car and a check disclosed it was registered to Douglas Ker at 4801 Slauson. Fifteen minutes later, Sergeant Warthen communicated the foregoing to Deputy Berman.

Since November, 1959, Deputy Berman knew Ker as a narcotic suspect; he had received bits of information regarding him from "various persons"; he had been told Ker was selling marijuana from his home and he was possibly securing it from Ronald Murphy, alias "Ronnie" Murphy; in early 1960, he received a "mug" picture of Ker from the Inglewood Police Department and until May, 1960, continued to receive various bits of information about him. Between May and July, 1960, Berman received information concerning Ker from one Black, a previous informant whose information Berman had used in other cases on at least three occasions resulting in arrests of two on forgery and one on narcotics and whose information Berman believed to be reliable; Black also supplied information to Berman relative to Murphy which had aided

officers in their investigation of Murphy resulting in a complaint in the Federal Court which was then pending. Black had told Berman that Ker and others had bought quantities of marijuana from Murphy.

Acting upon the foregoing information and that relayed to him by Sergeants Cook and Warthen as hereinabove described, on July 27 between 9 and 10 p.m., shortly after Warthen had observed Murphy and Ker; Berman, Warthen and Deputy Love went to an apartment house at 4801 West Slauson Avenue; they first determined that Ker's car was parked behind the apartment house, ascertained that defendants lived in apartment 29 and were home, obtained a key from the manager so they would not have to break the door down, unlocked the door quietly so defedants would not hear their approach and attempt to destroy the evidence, and entered. The apartment had a kitchen, living room, bedroom and bath room. Ker was seated in the living room; they identified themselves and told him they were conducting a narcotics investigation; simultaneous therewith, Ker's wife, Diane, walked from the kitchen into the living room; Berman identified himself to her and immediately walked to the kitchen door without entering; standing in the doorway Berman observed a small scale on top of the sink—on the scale was a brown paper package containing a 2-2 10ths-pound brick of marijuana (Exhibit 1), near it was a knife.

Defendants called Robert J. Black, presently serving time in Mira Loma, as their witness. He testified he had known them 4½ years but denied knowing anything connecting them with the narcotic traffic, and denied he ever made statements to that effect to Berman or any other police officer; he admitted having met Deputy Berman at the bowling alley.

The motion denied, the matter was tried before a jury. Evidence of Sergeant Warthen's surveillance of Murphy and Ker, and Berman's entry on the premises was presented to the jury. Continuing with his testimony, Deputy Berman, after walking to the kitchen door and seeing the marijuana on the scales said to defendants: "What is this," defendants answered they did not know; Berman said, "It appears to be marijuana to me. It is yours?", defendants did not answer. Deputy Berman then arrested defendants and asked them "if they had any other narcotics or contraband in the apartment. They answered they did not." The officers then took defendants into the bedroom; there they saw a box containing ½ ounce of marijuana (Exhibit 2) atop a dresser; asked if it was theirs, defendants remained silent. Sergeant Warthen searched the kitchen and found in the cupboard a brown manilla bag containing ½ ounce of marijuana (Exhibit 2); asked to whom it belonged, defendants remained silent. Warthen also saw in the kitchen a cup containing coffee, a partially eaten slice of toast and some silverware on the table and a coffee pot on the drainboard close to the marijuana on the scales. Mrs. Ker told Warthen that she had been sitting at the table in the kitchen drinking coffee and eating toast, but had not looked in the direction of the marijuana. Sergeant Warthen then asked the defendants if they owned any other auto than the one parked in the back and which they had seen Ker driving; Ker said they did not; Mrs. Ker remained silent. Berman had information Mrs. Ker owned a car; around noon the next day he went to the car which was registered in the name of Diane Ker, searched it and found marijuana seed under the

rear seat and a bag containing marijuana (Exhibit 3) in the dashboard compartment.

In his defense, Ker testified that he and his wife left the apartment at 7:30 p.m. to look for a new apartment, and returned at 10:00 p.m.; that before leaving he received a call from an unknown person and that a kitchen window had been tampered with in their absence. He denied prior knowledge or possession of the 2-pound brick of marijuana (Exhibit 1); admitted ownership of the box (Exhibit 2) but denied the marijuana in it was his; denied having met anyone during the period between 7:30 and 10:00 p.m., except Beswick whom they had visited; and admitted he knew Murphy but denied any rendezvous with him. Mrs. Ker corroborated her husband and denied prior knowledge of the marijuana (Exhibit 3) found in her automobile. Mr. Ker's father and mother and Mrs. Ker's mother corroborated defendants' testimony relative to the "suspicious circumstances" of the telephone call and the tampered kitchen window. Beswick testified defendants visited him that night in his apartment. The theory of the defense was that while defendants were absent between 7:30 and 10:00 p.m. someone planted the marijuana in their apartment.

On rebuttal, Sergeant Keith of the Glendale Police Department testified to a conversation with Ker in 1957, wherein the latter told him he had smoked marijuana several times but got "no kick out of it"; that Ker saw marijuana, which was identified as such, at that time.

Inasmuch as the officers had no warrant for the arrest of defendants to be valid the former must then have had reasonable cause to believe they had commit-

ted a felony. (Sec. 836(3), Penal Code; People v. Bracamonte, 194 A.C.A. 108.) There being no formula for its determination, what constitutes "reasonable cause" depends upon the facts and circumstances of each case (People v. Ingle, 53 Cal. 2d 407; People v. Wickliff, 144 Cal. App. 2d 207; People v. Hollins, 173 Cal. App. 2d 88)—the situation presented or apparent to the officers at the time they were required to act. (People v. Evans, 175 Cal. App. 2d 274; People v. Hollins, 173 Cal. App. 2d 88; People v. Silvestri, 150 Cal. App. 2d 114; People v. Carella, 191 A.C.A. 110; People v. Kilvington, 104 Cal. 80; People v. Murphy, 173 Cal. App. 2d 367.) The weight to be accorded the information possessed by the officers at the time they made the arrest is for the trial court, in the exercise of its sound discretion. (People v. Fisher, 184 Cal. App. 2d 308; People v. Taylor, 176 Cal. App. 2d 46; People v. Arter, 169 Cal. App. 2d 439; Lorenzen v. Superior Court, 150 Cal. App. 2d 500.) "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (Bompensiero v. Superior Court, 44 Cal. 2d 178, 183; People v. Fischer, 49 Cal. 2d 442; People v. Ingle, 53 Cal. 2d 407; People v. Kilvington, 104 Cal. 80.)

Deputy Berman, since November, 1959, knew of Ker from "various persons, bits of information," that Ker was possibly securing marijuana from Murphy and selling it from his residence; since early 1960, Berman knew what Ker looked like, and continued to receive "various bits of information" up to May, 1960. From Black, a reliable informer, Berman, between May and July 27, 1960, received information concerning Ker's

activities and trafficking of marijuana and that Ker had purchased from Murphy. The night before the arrest Berman learned that Murphy, known to him as a large-scale marijuana seller, then out on bail in connection with several marijuana offenses, kept his narcotic supply in the oil fields near Fairfax and Slauson; Berman knew of the rendezvous between Murphy, Terrhagen and Cook, Murphy's furtive conduct, the location and time of the meeting and that Murphy had sold Cook one pound of marijuana. Immediately prior to the arrest Berman learned that Murphy in his DeSoto went to the same bowling alley, passed the same Slauson-Fairfax rendezvous where Ker was seated in his car at approximately the same location near the open fields at which Terrhagen and Cook had waited the night before, drove north on Fairfax into the oil fields in the same direction at about the same time of night, returned to Ker's car in the same fashion, left his automobile and talked to Ker. A check of the license number of the car Ker drove revealed his name and address. Immediately after ascertaining all of this information Berman and several officers proceeded to Ker's apartment where they arrested defendants with 2-2 10ths pounds, of marijuana in their possession. Viewing the information in the possession of the officers at the time they entered the premises and arrested defendant, we deem the same to have afforded them sufficient ground for the belief that Ker had just secured marijuana from Murphy and had it in his possession.

While the distance between Sergeant Warthen and Ker at Slauson and Fairfax prevented him from observing anything change hands between Ker and Murphy or hearing their conversation, it is a reasonable in-

ference from what had occurred just prior thereto, the past repute, furtive conduct and activities of both Murphy and Ker, that Ker in the same fashion as Cook the night before had received from Murphy delivery of the same kind of merchandise (marijuana) and that Ker was returning with it to his home. Substantial circumstantial evidence destroys any merit to appellant's position that because the officers, by reason of distance and the time of night, observed nothing pass between Murphy and defendant, there existed no probable cause to believe he received marijuana and had it in his possession.

In People v. Tahtinen, 50 Cal. 2d 127, the officers had prior information concerning the seller, Hernandes, but none concerning defendant. Hernandes, through the prior arrests of three persons, was known to the officers as a seller, doing business from his residence; officers saw defendant parked across the street from Hernandes' home, drive off, ride around and repark, walk into Hernandes' driveway, return to the alley, stop and appear to pick up an object at the base of a tree. They arrested him as he drove away and found heroin on his person and in his car. Defendant contended that the officer arrested him without reasonable cause to believe he had committed a felony; said the court: "This contention cannot be sustained. The information obtained from the three persons previously arrested gave the officers reasonable cause to believe the narcotics were being sold by Hernandes at his residence, and defendant's furtive conduct in the vicinity of Hernandes' house gave the officers reasonable cause to believe that defendant had purchased narcotics and had them in his possession." (p. 134). The case at bar is even stronger in that officers here had prior

information concerning not only Murphy, the seller, but Ker the defendant.

While Diane Ker had not before been suspect, the evidence discloses something more than her "mere presence at the scene of a crime." (A.O.B., p. 20). Deputy Berman knew from Black that Ker was selling marijuana at his residence; it could be assumed that if Ker was married, particularly in view of the size of the apartment in which they lived together, that his wife was not entirely without knowledge of his unlawful activities. But more important, her conduct when the officers entered the apartment and her admitted prior occupancy of the kitchen wherein the marijuana was in plain sight made it obvious to the officers, even before they started their search, that she too was in the process of committing a felony (possession of marijuana). When the officers walked into the living room, Diane walked from the kitchen where the marijuana lay on the scale in the middle of the drainboard; she said she had been sitting at the table drinking coffee and eating toast; the coffee pot was on the drainboard very near the scale and marijuana. This lends little credit to her statement that she did not look in that direction or know the contraband was there.

Appellants say that the officers violated Section 844, Penal Code, in entering their apartment without first demanding admittance or explaining the purpose of their visit. Under circumstances such as those at bar, where police officers at a closed door have reason to believe that narcotics are to be had inside of the room and that if they do not enter quietly and/or in haste the narcotics will be destroyed by the occupants, they act reasonably when in an effort to surprise them the of-

ficers either gain entrance by stealth or force their way in. (People v Ramsey, 157 Cal. App. 2d 178, People v. Maddox, 46 Cal. 2d 301; People v. Ruiz, 140 Cal. App. 2d 630; People v. White, 167 Cal. App. 2d 794.) No two situations are identical. Each depends, for determination of reasonableness, upon its own facts. (People v. Williams, 175 Cal. App. 2d 774.) Deputy Berman's knowledge of Ker's prior activities, his information that Ker was a seller out of his residence and his knowledge of Ker's conduct during the previous hour, that someone was then in the apartment and Ker's car was parked behind the building, were sufficient circumstances to justify the reasonable belief that it was Ker who was in the apartment and that he had then a considerable amount of marijuana in his possession, and that warned in advance of the arrival of police he would have attempted to destroy the same. Quick and quiet police action was warranted; to have announced themselves and/or delayed entry, the officers would have provided Ker sufficient time within which to dispose of or destroy the narcotics. It was neither improper nor unreasonable for the officers to enter as they did.

Having had reasonable cause to believe Ker was in his apartment and had in his possession a substantial amount of marijuana, the officers believing he committed and was commiting a felony, entered the premises for the purpose of arresting Ker. As they entered the living room and identified themselves, Mrs. Ker simultaneously walked from the kitchen to the living room at which time Deputy Berman walked several steps to the kitchen door without entering the kitchen. He saw in plain sight the marijuana on the scales. At this time no search had been made; Deputy Berman ob-

served what was in plain view. (People v. Roberts, 182 Cal. App. 2d 431; People v. Quinn, 194 A.C.A. 173.) The search of the apartment did not take place until defendants had been arrested; a search incident to lawful arrest is not unlawful. (People v. Winston, 46 Cal. 2d 151; People v. Montano, 184 Cal. App. 2d 199; People v. Quinn, 194 A.C.A. 174.)

In the light of the implied findings of the trial court in its conclusion that probable cause existed, and the more than ample facts supporting the same; and the circumstances surrounding the entry, the finding of the marijuana and the subsequent search of defendant's apartment, the recent reference to Mapp v. Ohio, —— U. S. ——; 81 S. Ct. 111, 6 L. ed. 2d 1081, does not justify a change in our original conclusion.

Deputy Berman disclosed the identity of Black, but as to any other informants, the trial court permitted him to invoke the privilege of non-disclosure (Section 1881.5, Code of Civil Procedure). Thereafter, defendants made no motion to strike Berman's testimony, although they had ample opportunity to do so—after the officer invoked the privilege and before the issue was submitted, colloquy took place between the court and counsel, defendants put on Black as their witness and the motion was argued. "A defendant cannot raise the problem of nondisclosure in the appellate courts when he . . . did not move to strike the testimony on a refusal to disclose. (citations)." (Priestly v. Superior Court, 50 Cal. 2d 812, 819.) Appellants argue they are excused from making the motion because it was *then* obvious from the trial court's statement that it would not have been granted. But the record does not bear this out; it shows that the trial court did not make the statement which "revealed its feeling about

these informants" (A.O.B., p. 15) until long after the motion could and should have been made, and after the issue of probable cause had been submitted. It was only then the court stated: "I don't think its upon the—incumbent to furnish the name of the informers and I don't think it would have any real significance as far as their preparing the defense is concerned."

Citing Priestly v. Superior Court, 50 Cal. 2d 812, appellants say the trial judge should have required Berman to reveal the names of other informers; we find no error here. The record discloses that the so-called "informants" referred to by appellants actually are the "various persons" who between November, 1959, and May, 1960, gave Berman "various bits of information" that Ker was suspect of selling marijuana he secured from Murphy, out of his home. Even appellants concede "that the officer did not state he was relying upon the information given by others from November, 1959, to May, 1960, in making the search and arrest." (A.O.B., p. 18); and Berman testified he relied upon the information relayed to him by Sergeants Warthen and Cook, a "mug" picture from the Inglewood Police Department, and information given to him by a Black whose full name he revealed. Both Warthen and Berman denied, and the denial is nowhere controverted, that anyone had ever given them information that at the time of the arrest Ker had marijuana in his possession at his apartment. Nor does the testimony show that any of the "various persons" participated in the crime, were eyewitness non-participants, had anything to do with any of the events of July 26 or 27, were even in the vicinity or any of the locations at the times mentioned in the testimony, were present at the time and place of arrest, had ever pointed out Ker, his

auto or his residence to the officers, or had even communicated with the officers since the first of May, 1960. Actually, the officers did not set out on July 27 to arrest Ker, they had no interest in him; their main concern was the "large-scale" seller, Murphy. They "stumbled" onto Ker in the process of their investigation of Murphy, and realizing, from what they knew of Murphy and had just seen occur between him and Ker, that Ker must have had a substantial amount of marijuana in his possession after leaving Murphy at Slauson and Fairfax, decided to arrest him before he was able to dispose of it. We fail to see under the circumstances hereinbefore described how the "bits of information" obtained from "various persons" so long before the arrest could be "relevant and helpful to the defense of the accused or essential to a fair determination of a cause" (People v. McShann, 50 Cal. 2d 802, 808); nor can we see any purpose at all useful to the defendants had these persons been brought into court. (People v. Williams, 175 Cal. App. 2d 774.) This situation does not fall within the purview of Priestly v. Superior Court, 50 Cal. 2d 813.

Appellants' final contention goes to the sufficiency of the evidence to prove their dominion and control over the contraband and their knowledge of its presence and narcotic character. The case presents a direct conflict in the evidence. Defendants would have the jury believe they knew nothing about marijuana, that found in the apartment did not belong to them, they did not know it was there and someone must have planted it in their absence that night; but the jury, disbelieving the defendants and their witnesses, as it had a right to do, rejected their defense. (People v. Stanciell, 121 Cal. App. 2d 798.) Thus, viewing the evidence in a light

most favorable to the respondent, we find numerous incriminating circumstances revealing that the defendants not only knew what marijuana was but that the marijuana found in their apartment belonged to them.

We refer first to Ker. It is obvious that the officers had no intention of arresting Ker when they started their surviellance of Murphy on the evening of July 27; that it was Ker who met with Murphy was for the most part incidental to what the officers expected to find in an investigation of Murphy; and that no one knew in advance, much less the officers, that they would go to Ker's apartment between 9 and 10 p.m. to arrest him. Ker's association with Murphy only an hour before the former's arrest, his furtive meeting with Murphy at night in a fairly deserted location where the night before Murphy had sold marijuana to Cook after a similar trip into the oil fields, and his conversation with Murphy in a parked car without lights at the side of the road, constituted substantial circumstantial evidence that Ker then and there obtained marijuana from Murphy and thereafter had it in his possession; and this coupled with the presence shortly thereafter of a two-pound brick of marijuana in his kitchen resting on a scale (on which it obviously had been weighed after its purchase), can leave only one reasonable conclusion—that Ker secured the two-pound brick from Murphy and took it home to weigh it before disposing of it. And finally, Ker definitely knew about marijuana before—he had admitted to officer Keith in 1957, in the presence of marijuana that had been identified as such, that he had smoked it; Ker had small amounts of marijuana in other places in his apartment—the officers found some in a box on the dresser in defendants' only bedroom and in a sack in

the kitchen cupboard; Ker made no denial of possession —he remained silent in the face of the officer's questions in the apartment concerning to whom the marijuana belonged; Ker's answer to Berman's question assumed Ker knew the substance was marijuana and that it belonged to him—Berman after discovering the two-pound brick in the kitchen, asked him if he had "any other narcotics" in the apartment and Ker answered "that he did not"; Ker's lie to the officers when he denied that they owned any other vehicle than the one registered to him; and Ker's doubtful story on the stand that the marijuana had been planted in his apartment. The circumstances pointing to Mrs. Ker's guilty knowledge are as revealing. Two and two-tenths pounds of marijuana, which would make a large number of cigarettes (Berman testified that one ounce of marijuana yields from 40 to 60 cigarettes), obviously were not for the Kers' own use, thus Ker, as the officers already knew, must have been peddling it from his apartment; it would be difficult to believe Diane Ker, as his wife, living with him in the small apartment, did not know of his unlawful activities therein and did not know the contraband was marijuana. According to her admission to the officers and their testimony, immediately prior to the officers' entry, she had been occupying the kitchen and drinking coffee at the table in very close proximity to the marijuana on the scale in plain sight, in fact when the officers entered the living room she walked into it directly from the kitchen. Other circumstances relate to her silence when asked about other small amounts of marijuana found in her apartment, her silence when asked if she owned a car, the discovery of marijuana in two places in a car registered to her, and her ridiculous statement (although she drank

coffee in the kitchen and obviously poured it from a pot standing close to the marijuana on the scales) that she didn't look in that direction and did not know it was there.

On the issue of joint possession the court in People v. Basco, 121 Cal. App. 2d 794, stated: "A person may be so closely interested in and connected with the unlawful possession of narcotics by another as to furnish support for a finding that there was a joint possession" (p. 796); and to show "knowing possession the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient. (citations)." (People v. Foster, 115 Cal. App. 2d 806, 808; People v. Stancielf, 121 Cal. App. 2d 798.)

"It is clear that the evidence and the reasonable inferences therefrom support the implied finding of the jury that both defendants had knowledge of and a joint dominion and control over the contraband found in their apartment and were thus guilty of possession (People v. Bagley, 133 Cal. App. 2d 481; People v. Hood, 150 Cal. App. 2d 197.)

For the foregoing reasons the judgment and order are affirmed.

Lillie, *J.*

We concur:

Wood, *P. J.*

Fourt, *J.*